Nebraska Law Review

Volume 55 | Issue 2 Article 6

1975

A New Rule on Obtaining Membership Information: *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975)

Jill Beckoff Nagy
University of Nebraska College of Law

Note

A New Rule on Obtaining Membership Information

Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975).

I. INTRODUCTION

In *Eastland v. United States Servicemen's Fund*,[1] the United States Supreme Court held that an organization may not enjoin the issuance of a subpoena served on a third party demanding records of the plaintiff organization which are equivalent to membership lists. Thus, the Court took a large step toward repudiating the holding of *NAACP v. Alabama*[2] that membership lists of controversial but legitimate organizations are protected from the hooks of legislative fishing expeditions and "investigations" which harass more than they inform.

The case dealt not with membership lists but with equally important information about contributions. However, the Court's majority avoided squarely facing the protection issue by resting its decision on a finding of congressional immunity.

In the process, the Court considerably broadened the scope of congressional immunity and, if it did not actually overrule *NAACP*, it certainly limited its effectiveness. The case may have the anomolous effect of giving first amendment rights greater protection from state legislators than from the very Congress which the first amendment addresses.[3]

II. THE FACTS OF THE CASE

The case grew out of a subpoena duces tecum[4] issued on May

1. 421 U.S. 491 (1975).
2. 357 U.S. 449 (1958).
3. Virtually all the case law protecting membership information resulted from challenges to the power of state investigating committees. The leading cases, in addition to *NAACP*, are Pollard v. Roberts, 393 U.S. 14 (1968); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1962); Gibson v. Florida Legislative Comm., 372 U.S. 539 (1962); and Bates v. Little Rock, 361 U.S. 516 (1960).

   The decision may also reflect the Court's lack of concern for the protection of "expressive activity" as opposed to "pure speech."
4. A subpoena duces tecum is an order to appear with a particular item,

28, 1970 by the Senate Subcommittee on Internal Security[5] in the course of an investigation of "the administration, operation, and enforcement of the Internal Security Act of 1950, . . . espionage, sabotage, and the protection of the internal security of the United States; and . . . subversive activities. . . ."[6]

The subpoena was issued to the Chemical Bank New York Trust Company and demanded the records of the United States Servicemen's Fund, Inc. ("USSF"), a non-profit organization that sponsored coffee houses near United States military bases, published newspapers for servicemen, and otherwise provided forums for dissident opinion among members of the armed forces.[7]

USSF sued in the District Court for the District of Columbia[8] to enjoin enforcement of the subpoena and for a declaratory judgment that both the subpoena and the resolution authorizing it were void.[9] The action was against the subcommittee chairman, Senator James Eastland, its members and general counsel, and the bank. The bank, in New York City, however, was dropped as a party because it could not be served with process.[10]

The Fund alleged that the subpoena threatened rights of privacy, free press, free speech, free association, and freedom from unreasonable search and seizure of the association and its members.[11] It further charged that the subpoena was issued to the bank rather than directly to the organization in order to deprive USSF and its members of their rights.[12]

The main thrust of the complaint was an allegation that the bank records included information about contributors to the organization and were, therefore, functionally equivalent[13] to member-

---

in this case, the bank records in question. The subpoena apparently was never served. 421 U.S. at 494-95 n.4 and accompanying text.

5. This is a subcommittee of the Committee on the Judiciary. It is now headed by Senator James O. Eastland (D-Miss.) and was at one time chaired by Senator Joseph McCarthy (R-Wis.).
6. CONG. REC.: S. Res. 341, 91st Cong., 2d Sess., 116 CONG. REC. 3418 (1970). The date in the Court's opinion is incorrect. *See* note 48 *infra*.
7. 421 U.S. at 493-94.
8. Suit was brought in the District of Columbia because the Court of Appeals for the Second Circuit had held in a suit against the same Subcommittee and its counsel that jurisdiction and venue lay only in the District.
   Id. at 513 (concurring opinion).
9. *Id.* at 496.
10. *Id.* at 513-14.
11. *Id.* at 495.
12. *Id.*
13. The bank records of respondent membership organizations are functionally the equivalent of their membership lists reveal-

ship lists and entitled to the same protection.[14] It was also charged that the mere attempt to find out who had contributed to the Fund and how much they had given would dry up further contributions.[15]

The district court denied relief, finding that it lacked jurisdiction; that USSF lacked standing; and that there was little chance that USSF would succeed on the merits.[16] The Circuit Court of Appeals for the District of Columbia granted a stay in the enforcement of the subpoena,[17] reversed the district court's decision, and remanded the case for consideration of the prayer for injunctive and declaratory relief. On the remand, the district court refused to issue a preliminary injunction on the grounds that USSF had little chance of ultimate success. The court of appeals issued a second stay and docketed the appeal of the second district court decision three months later. In the interim, the case was again remanded to the district court for consideration of the prayer for a permanent injunction. The lower court was urged to act expeditiously so that its decision could be reviewed along with the appeal already docketed.[18]

As requested, the district court acted quickly. It denied the injunction. In October, the case was heard for the sixth time and the court of appeals once again reversed the district court.

In its opinion, the court of appeals acknowledged that equity powers should be used sparingly, even when first amendment rights

---

> ing the identities of supporters and the extent of individual membership contributions. They would further reveal the nature and extent of disbursements of various associational activities protected by the First Amendment.
>
> Brief for Respondents at 7.

There was no real argument on this point. It is clear from both the Brief for Petitioners and the Court's decision that it was the identification of contributors that was sought.

14. This argument had been accepted by the Supreme Court in Pollard v. Roberts, 393 U.S. 14, *aff'g per curiam* 283 F. Supp. 248 (E.D. Ark. 1968).
15. Brief for Respondents at 16-17.
16. 421 U.S. at 496 n.9. *See also* United States Servicemen's Fund v. Eastland, 488 F.2d 1252 (D.C. Cir. 1973), for a detailed discussion of the lower court decisions.
17. 421 U.S. at 496 n.9. The stay was granted only days before the return date on the subpoena. *Id.* at 496.
18. > It would therefore be in the interest of justice if the case could proceed expeditiously in the District Court on the merits. The final judgment of the District Court is likely to be appealed whichever way the court rules.
>
> 488 F.2d at 1257.

were at stake.[19] However, the court found "this case differs from those which have been discussed in that none of the means by which the plaintiffs' constitutional rights can be vindicated, which existed in all the previous cases, are here present . . . ."[20]

It rejected the Government's argument of "absolute congressional immunity,"[21] and noted that, in most cases, alternate means of relief are available and, therefore, courts are loath to enjoin congressional action even though they have the power to do so. Here, the court felt, no other relief was possible.[22]

Having dismissed the claim of immunity, the court then found that the threat to the organization's rights posed by the subpoena outweighed the interest of Congress in getting the information sought. Consequently, it held that both declaratory and, apparently for the first time, injunctive relief were available to USSF against the named senator, his colleagues on the Internal Security Subcommittee, and the subcommittee's general counsel. The case was again remanded to the district court, with the recommendation that declaratory, rather than injunctive, relief be granted.[23] That decision was appealed to the United States Supreme Court, which granted certiorari.[24]

III. THE SUPREME COURT'S OPINIONS

In the Supreme Court decision, there were three opinions, each addressing a different issue presented by the case. Chief Justice Burger, writing for the majority, accepted the Government's argument of absolute congressional immunity and found that the Court had no power to review the subpoena.[25] In a concurring opinion, Justices Marshall, Brennan, and Stewart agreed that the nature of the instant case made relief impossible but, they suggested that a different procedure and/or different defendants would provide a forum for USSF's constitutional claims. The third opinion, Justice Douglas' dissent, went directly to the first amendment issue and decided it in favor of the Servicemen's Fund.

---

19. *Id.* at 1259.
20. *Id.*
21. *Id.* at 1258.
22. *Id.* at 1271. Other relief, of course, was possible, but not in the same suit. USSF could have sued to prevent service of the subpoena or compliance by the bank. *See* note 79 *infra* and accompanying text.
23. *Id.*
24. 419 U.S. 823 (1974).
25. Joining Chief Justice Burger were Justices Blackmun, Rehnquist, White and Powell.

A. The Majority Opinion

While the majority framed the issue before it in first amendment terms,[26] the answer was based entirely on congressional immunity.[27]

The Court found that: (1) investigations, such as that of the Eastland subcommittee, were within the sphere of legislative activity;[28] (2) Congress could issue subpoenae in connection with its investigations,[29] and (3) USSF was a proper subject for investigation.[30] Therefore, the Court reasoned, any subpoena issued in connection with this investigation was immune from judicial review.[31]

In support of this position, the Court listed the classic speech and debate clause cases: *Doe v. McMillan*,[32] *Gravel v. United States*,[33] *United States v. Brewster*,[34] *Powell v. McCormack*,[35] *United States v. Johnson*,[36] *Tenney v. Brandhove*,[37] and *Kilbourn v. Thompson*.[38] It also listed *Barr v. Matteo*,[39] which was not a congressional immunity case.[40]

---

26. . . . whether a federal court may enjoin the issuance by Congress of a subpoena duces tecum that directs a bank to produce the bank records of an organization which claims a First Amendment privilege status for those records on the ground that they are the equivalent of confidential membership lists.

    421 U.S. at 492-93.

27. We conclude the actions of the Senate Subcommittee, the individual Senators, and the Chief Counsel are protected by the Speech and Debate Clause of the Constitution, Art. I, § 6, cl. 1, and are therefore immune from judicial interference.

    Id. at 501.

    The clause reads:

    . . . .

    They shall in all Cases, except Treason, Felony and Breach of Peace, be privileged from Arrest . . . and for any Speech or Debate in either House they shall not be questioned in any other Place.

    U.S. CONST. art. I, § 6.

28. 421 U.S. at 504.
29. *Id.* at 505.
30. *Id.* at 506.
31. *Id.* at 507.
32. 412 U.S. 306 (1973).
33. 408 U.S. 606 (1972).
34. 408 U.S. 501 (1972).
35. 395 U.S. 486 (1969).
36. 383 U.S. 169 (1966).
37. 341 U.S. 367 (1951). This case involved a suit under the Civil Rights Act against a state legislature.
38. 103 U.S. 168 (1881).
39. 360 U.S. 564 (1959).
40. *Barr* was a libel suit brought by two former subordinates against the

If there is one unifying thread running through the cases cited by the Court, it is that the protection of the speech and debate clause ends when legitimate legislative activity ends: when the congressionally authorized arrest is made,[41] when Congress exceeds its authority to determine the qualifications of its members,[42] when a former senator is charged with accepting a bribe in connection with his legislative activities,[43] when congressional findings are published to the general public,[44] or when an investigation exceeds the bounds of legislative inquiry and invades the executive or judicial sphere.[45]

Had the Court applied the traditional analysis to the instant case, it would have found itself powerless to look at the process of authorizing the subpoena but quite able to examine the contents of the subpoena, the procedure by which it was delivered and enforced, and its probable effect upon USSF. This is what the court of appeals did and what the concurring Justices suggest that they would do given the proper defendants.[46]

In addition to its unusual degree of restraint in dealing with the issue, the majority opinion contained other aspects that merit close scrutiny. First, it ignored the rule established in *Watkins v. United States*[47] that congresssional investigations which threaten first amendment rights do not receive a presumption of validity. In the process of doing this, the majority sanctioned an investigation based upon a Senate resolution identical in tone to that which

---

former Acting Director of the Office of Rent Stabilization. The Court held that petitioner was immune from suit. Although the matter was discussed on the floor of Congress, the only immunity alleged was that of the executive involved.

41. 103 U.S. 168 (1881).
42. 395 U.S. 486 (1969).
43. 408 U.S. 501 (1972).
44. 408 U.S. 606 (1972); 412 U.S. 306 (1973).
45. 341 U.S. 367. It has been suggested that the *Tenney* decision was overruled sub silentio in Bond v. Floyd, 385 U.S. 116 (1966), when the Court allowed a suit under the Civil Rights Act against the Georgia House of Representatives. Reinstein & Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113 (1973).
46. Justice MacKinnon, who dissented from the court of appeals decision, followed the same analysis, but came to a different conclusion. He argued that the distinguishing fact was that the Eastland subcommittee sought the facts for a legitimate purpose. 488 F.2d at 1277. He also balanced the interests of USSF and those of Congress and found those of Congress to be stronger as, he noted, the Supreme Court had found in Barenblatt v. United States, 360 U.S. 109 (1959) and Uphaus v. Wyman, 360 U.S. 72 (1959). *See* 488 F.2d at 1277-78.
47. 354 U.S. 178 (1957).

was found to be excessively vague in *Watkins*.[48] Second, it made no attempt to consider the Fund's first amendment claims and balance them against the interests of Congress. It thus possibly overruled the membership list cases[49] and removed another foundation stone supporting the first amendment's "preferred position."[50] Last, the opinion failed to distinguish between legitimate legislative functions and the judicial and administrative activities in which congressional investigators sometimes engage.

2. *The* Watkins *Burden of Proof Rule*

Generally, acts of Congress enjoy a presumption of validity.

48. Watkins, charged with contempt for refusing to answer questions, challenged the authority of a House committee operating under authority of a House resolution, the relevant portion of which is in the opinion:

> The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

Id. at 201-02.

The resolution authorizing the Eastland investigation is more verbose, but no more specific:

> *Resolved*, That the Committee on the Judiciary, or any duly authorized subcommittee thereof, is authorized under sections 134(a) and 136 of the Legislative Reorganization Act of 1946, as amended, and in accordance with its jurisdiction specified by rule XXV of the Standing Rules of the Senate insofar as they relate to the authority of the committee, to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950, as amended; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effect of subversive activities in the United States, its territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force or violence.

CONG. REC.: H. Res. 5, 83d Cong., 1st Sess., 99 CONG. REC. 15 (1953).

49. *See* note 3 *supra*.

50. Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression.

Thornhill v. Alabama, 310 U.S. 88, 98 (1939).

One exception to this rule, which was articulated in *Watkins*, is that actions which threaten constitutionally protected rights, particularly first amendment rights, do not receive this presumption. The *Watkins* decision also placed a check on the investigative powers of Congress.[51] More specifically, it made three points which, if they had been considered in the *USSF* decision, might have changed the outcome of that case:

(1) Because a congressional investigation is part of the legislative function of Congress, it is also subject to the restraint that the first amendment places upon legislation, namely that "Congress shall make no law . . . abridging freedom of speech . . . ."[52]

(2) "[T]here is no congressional power to expose . . . where the predominant result can only be an invasion of the private rights of individuals."[53]

(3) When members of Congress exercise authority granted to the entire Congress, such as the power to subpoena witnesses, they must be authorized to do so by a narrowly drawn and explicit resolution. The *Watkins* resolution[54] was found to be excessively vague; the *USSF* resolution was never examined.

The first—and probably most important—argument presented by *Watkins* was completely ignored in *USSF* because the Court saw a veil of immunity covering all congressional activities. However, given the language of the first amendment, it is difficult to see how infringement of first amendment rights can be within the sphere of legitimate legislative activity.

The *Watkins* Court did not go so far as to say that any infringement of first amendment rights is ipso facto beyond the pale of legitimate legislative activity. It did, however, say that anytime legislative activities threaten first amendment rights, the legislators have the burden of showing that their investigation and the specific information sought are sufficiently vital to their legislative function to justify the infringement. Specifically, the committee in *Watkins*

51. The investigating committee in that case was the House Committee on Un-American Activities, later called the House Committee on Internal Security. That same committee was the petitioner in three suits argued along with *Eastland*. Those suits were against the National Peace Action Coalition, the Peoples Coalition for Peace and Justice, and the Progressive Labor Party, respectively. None of them was decided because the session of the House in which the subpoenae were issued had expired and the committee that issued the subpoenae was subsequently abolished. 421 U.S. at 511.

52. 354 U.S. at 197.

53. *Id.*

54. *See* note 48 *supra*.

had the burden of showing that it was not engaged in exposure for the sake of exposure.

In *USSF*, the Court placed no such burden on the Eastland subcommittee. On the contrary, it said:

> The propriety of making USSF a subject of the investigation and subpoena is a subject on which the scope of our inquiry is narrow. . . . Even the most cursory look at the facts presented by the pleadings[55] reveals the legitimacy of the USSF subpoena. Inquiry into the sources of funds used to carry on activities suspected by a Subcommittee of Congress to have a potential for undermining the morale of the armed forces is within the legitimate legislative sphere. Indeed, the complaint here tells us that USSF operated on or near military and naval bases, and that its facilities became the "focus of dissent" to declared national policy. Whether USSF activities violated any statute is not relevant; the inquiry was intended to inform Congress in an area where legislation may be had. . . . [I]n light of the Senate authorization to the Subcommittee to investigate "infiltration by persons who are or may be under the control of foreign governments," . . . and in view of the pleaded facts, it is clear that the subpoena to discover USSF's bank records "may be deemed within [the Subcommittee's] province."[56]

Since no mention of military morale is made in the subcommittee's authorizing resolution,[57] it could be argued that the inquiry into that subject was beyond its sphere.

The characterization of USSF as a "focus of dissent" comes closer to the spirit of the enabling resolution but that characterization, even if true, does not by itself make USSF a fit subject for congressional investigation. Congress cannot legislate against dissent; even the Internal Security Act,[58] which the committee was purportedly studying, does not go that far.

What the Senate did authorize the Eastland subcommittee to study was "infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force or violence."[59] However, even though that aspect of the subcommittee's investigation was authorized, it does not necessarily follow

55. It is a long way from "close scrutiny" to "even the most cursory look at the facts in the pleadings."
56. 421 U.S. at 506-07.
57. *See* note 48 *supra*.
58. The major provisions of the Internal Security Act of 1950, as amended, are at 50 U.S.C. §§ 781 *et seq*. Other provisions are at 18 U.S.C. §§ 791, 792, 793, 871, 1501 and 1507, and 22 U.S.C. § 618.
59. *See* note 48 *supra*.

that the specific information sought was vital—and the subcommittee was not required to show that it was. Indeed, it is difficult to see what legitimate use could have been made of the information. Even if the subcommittee were to find that USSF was infiltrated or controlled by Communists and others seeking to overthrow the Government, there was little that the subcommittee could do. It could not recommend legislation outlawing USSF. That would constitute a bill of attainder.[60] More general legislation against such infiltration already exists and its enforcement is not a legislative function.[61]

Rather than presume from "the most cursory look at the facts presented in the pleadings" that the subpoena was valid, the Court could have posed the questions the *Watkins* Court did: Is this information that is sought by subpoena sufficiently vital to a specifically defined legislative task to override first amendment claims? Is this subpoena drawn narrowly enough to reach only the information needed?[62]

Had these questions been asked, it is conceivable that the Eastland subcommittee could have justified the subpoena.[63] However, until such justification can be given, the burden of proof required by the rule of *Watkins* is not met.

2. The First Amendment Claims

The first amendment claims of USSF were presented in a somewhat unusual framework. Commonly, such claims reach the courts as defenses to contempt citations arising from a refusal to honor subpoenae or to answer questions. Furthermore, all the cases challenging subpoenae of membership lists[64] have involved state investigations.

60. "No Bill of Attainder or ex post facto Law shall be passed." U.S. CONST., art. I, § 9. A bill of attainder is a legislative act directed against a designated person, pronouncing him guilty of an alleged crime and punishing him for it.

61. For example, the Internal Security Act, note 58 *supra.*

62. These questions are another way of phrasing the traditional first amendment tests of compelling government interest and least restrictive means.

63. The case would probably have been based upon the defense power and the allegation that USSF was disrupting the conduct of the war in Southeast Asia. Further, it could have been argued that cases such as *Barenblatt* and *Wyman*, note 46 *supra*, stand for the proposition that Congress may investigate allegedly subversive organizations, even to the extent of asking individuals if they are members of such organizations. It could also be argued that if the Internal Security Act was not effectively stifling such subversion, either amendments or a new law might be needed.

The court of appeals quickly disposed of the first factual difference when it noted that the challenge before it was the only means available to USSF to assert its rights and those of its contributors. The organization could not be cited for contempt since the subpoena was not issed to it nor could it expect the bank to risk a contempt citation.[65]

In light of the fact that the Court based its decision upon a finding of immunity, the second distinction is more serious. However, most states have legislative immunity provisions similar to that in the Federal Constitution[66] and, in addition, a court could assume the existence of a common law immunity where no statutory or constitutional provision existed.[67]

Of the greatest importance, however, was the fact that although the posture of this case was different, the claim was identical to that made in *NAACP* and the other membership list cases: an organization may protect its members from infringement of their rights of privacy and free association.

Nowhere in the majority opinion was this claim seriously considered. Instead, it was dismissed in these terms:

> Finally, respondents argue that the purpose of the subpoena was to "harass, chill, punish and deter them" in the exercise of their First Amendment rights . . . . Their theory seems to be that once it is alleged that First Amendment rights may be infringed by congressional action the judiciary may intervene to protect those rights; the Court of Appeals seems to have subscribed to that theory. That approach, however, ignores the absolute nature of the speech and debate protection and our cases which have broadly construed that protection.[68]

Not only did the Court deny relief to USSF; it also reprimanded it for bringing the action at all:

> This case illustrates vividly the harm that judicial intervention may cause. A legislative inquiry has been frustrated for nearly five years during which the Members and their aides have been obliged to devote time to consultation with their counsel concerning the litigation, and have been distracted from the purpose of their inquiry.[69]

---

64. *See* cases cited in note 3 *supra.*
65. 488 F.2d at 1260.
66. In 1950, forty-one states had legislative immunity provisions.
67. This would be similar to the immunity enjoyed by members of the executive and judicial branches of government.
68. 419 U.S. at 508-09. The Court than quoted dictum from *Gravel* and *McMillan*, two cases where congressmen had exceeded their legislative authority. *Id.* at 509.
69. *Id.*

Contrast this approach with that used in the *NAACP* decision.[70] In the latter case, the Court first identified the rights of its members which the organization sought to protect. It then acknowledged that only the organization could protect those rights. Finally, it asked whether Alabama had shown a sufficiently compelling reason for interfering with these rights and found that it had not.

That same sort of analysis could have been applied to the USSF claim. Instead, the Court approached the problem from the other end, and asked only if the subcommittee was "legislating." It did not even press that inquiry very hard.

The protection of membership information is not absolute, as the Court has noted in *NAACP* and elsewhere.[71] However, the burden is properly on the Government to show why, in a particular instance, the protection should be denied.

3. *Legitimate Legislative Functions*

As already suggested,[72] issuance of the subpoena in question may not have been a legitimate legislative function even if, as the Court asserted, the Eastland subcommittee's investigation was properly legislative.

The question, "Is this a legitimate legislative function?," may be posed at any step of the investigative process: when Congress authorizes the investigation; when the committee, interpreting that authorization, sets the focus of its investigation; when the committee studies a particular organization or person; when it decides to seek particular information about that person or organization; when it chooses the method of acquiring the information; and when the chosen method is executed.

In this case, the Court did not inquire beyond the first steps. Rather than look at the content and probable effect of the subpoena, it looked at the surroundings from which it emerged. The majority opinion asserted that those surroundings—a subcommittee investigation authorized by a Senate resolution—were within the sphere

---

70. The case is only cited once in the Court's references to the decision of the court of appeals.

71. Such protection has been denied the Communist Party and the Ku Klux Klan. Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961); Bryant v. Zimmerman, 278 U.S. 63 (1928). Even in *NAACP*, the protection was a value to be balanced against the purpose of the legislative investigators.

72. *See* notes 48 and 54 *supra* and accompanying text.

of legitimate legislative function and, having said that, refused to look further.

As is evident from decisions of this and other courts, not everything done by legislators is legislation, even if it is done under the aegis of a valid resolution. Therefore, not everything a legislator does is protected by the speech and debate clause. Thus, even if, as the Court says, the immunity of that clause is absolute,[73] it can only be absolute during speech and debate and closely related activities. The further an activity gets from actual speech and debate on the floor of Congress, the less likely that it will be entitled to immunity. A subpoena is sufficiently far from the core of legislative activity to warrant close scrutiny, particularly when, as here, it threatens first amendment rights.

4. The Argument Against Immunity

The meager history of the speech and debate clause has been retold many times, and is recounted again in this decision.[74] The clause was apparently included in the Constitution with little or no debate[75] and, until fairly recently, carried little judicial gloss.[76] It seems, however, that its main intent was to maintain separation of powers by protecting legislators from interference by the executive branch. It may also have been the result of a compromise reached with advocates of legislative secrecy.[77] In any case, its primary intent does not seem to have been to provide a license to invade constitutionally protected rights of private citizens.

It could even be argued that first amendment freedoms deserve "more absolute" protection than legislative activities. The speech and debate clause and the first amendment are couched in the same mandatory language. The latter, however, is an amendment —a revision—of the document containing the former.

The point has also been made that suits by private individuals seeking to assert their constitutional rights do not pose the threat

73. 421 U.S. at 503.
74. *Id.* at 502. *See also* Reinstein & Silverglate, *supra* note 45; and Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecution in the Courts*, 2 SUFFOLK L. REV. 1 (1968).
75. Reinstein & Silverglate, *supra* note 45, at 1120 *et seq.*
76. From the time of the adoption of the Constitution until 1966, only four cases concerning the clause reached the Supreme Court's docket and only two of them had been decided on the merits. One of those was *Tenney*, in which the discussion of federal legislative immunity was dictum. The instant case is the sixth the Court has decided since 1966. *Id.* at 1114.
77. *Id.*. at 1137-38.

to Congress that executive interference would and, moreover, the effects on the individual are often great.[78]

The present case illustrates that thesis. The threat to Congress was so minimal (delay in a small aspect of a continuing investigation) and the threat to the organization so great (extinction of its funding and, probably, its existence) that it may be inappropriate even to consider a congressional immunity claim. In any case, it seems inappropriate to give it the presumption of validity it received from the Court.

B. The Concurring Opinion

The majority opinion suggested that once a legitimate legislative function was discovered, a court could inquire no further. The concurring Justices stated a more moderate position: a court will not inquire into legislative activities (which, in this case, included the subcommittee's decision to issue the subpoena), but it will look at the result of that activity. However, they said that since the only parties to USSF's lawsuit were the decision-makers, the Court's hands were tied.

The concurring opinion refrained from spelling out the alternate routes USSF might have taken.[79] A suit against the marshal who delivered the subpoena or the bank itself might have provided the desired forum in which to set out its position. Because that solution would require a second series of suits, it is somewhat inefficient. It does, however, have the virtue of preserving the amenities of the separation of powers.

In *Pollard v. Roberts*[80] the Court was faced with a case in

78. *Id.* at 1173-74.

79. This case does not present the questions of what would be the proper procedure, and who might be the proper parties defendant, in an effort to get before a court a constitutional challenge to a subpoena duces tecum issued to a third party. As respondent's counsel conceded at oral argument, this case is at an end if the Senate petitioners are upheld in their claim of immunity as they must be.
421 U.S. at 517-18 (concurring opinion).

80. 393 U.S. 14 (1968). *See* note 14 *supra*. This also would have avoided presenting the Court with a suit directly against a member of Congress. The Court has seemed more comfortable dealing with cases, such as *Kilbourn* or *Powell*, which address an employee of Congress. There is, however, no clear rule on the immunity of aides and employees. In *Gravel*, the Court spoke of aides as their employers' "alter egos," sharing their immunity. 408 U.S. at 616-17, 621. However, in *Dombrowski*, the Court said, ". . . this doctrine is less absolute, although applicable, when applied to officers or employees . . . ." 387 U.S. at 85. The employee referred to in *Dombrowski* is the same subcommittee counsel, Sourwine, originally a party to the USSF suit.

the mould the concurring Justices seemed to require. When so confronted, it did agree to an injunction prohibiting a bank from turning over the Arkansas Republican Party's records to a state prosecutor acting as a grand jury.[81] That case, however, raised no issue of legislative immunity[82] because the subpoena was not issued by a legislative committee.[83] The Republican Party's position was similar to that of USSF. It claimed that the investigation was meant to harass and stunt its growth.[84] The Court recognized that, ordinarily, neither a bank nor its depositors has any privilege to prevent disclosure of bank records.[85]

> This, however, is not an ordinary case. Apart from any right of the Party, as such, to have the information in question respected, individual contributors have the right to remain anonymous.[86] They cannot assert that right themselves without defeating their own purpose; if a party cannot protect the Bank records in the interest of the individual contributors, their right to privacy is nullified.[87]

This was precisely the argument made by the Servicemen's Fund and accepted by the court of appeals. The majority appeared to reject it out of hand when faced with a challenge to a congressional subpoena but the three concurring Justices strongly suggest that, in a proper suit, it would be a proper argument.

C. The Dissent

Justice Douglas' dissent is appealing in its simplicity and brevity. For him, individual rights, particularly those protected by the first amendment, must be sheltered from excesses of legislative zeal:

> Under our federal regime that delegates, by the Constitution and Acts of Congress, awesome powers to individuals, that power may not be used to deprive people of their First Amendment or other constitutional rights. It is my view that no official, no matter

81. 393 U.S. 14 (1968). Arkansas law allows such one-man grand juries.
82. This is the only meaningful distinction between *Pollard* and the present case.
83. If a prosecutor's subpoena can be enjoined, the subpoena of a legislative body should be even more vulnerable because issuance of subpoenae is central to the function of a prosecutor, but only tangential to that of a legislator.
84. 283 F. Supp. at 252.
85. *Id.* at 255. Both parties in *Eastland* agreed that no such privilege exists. *See* Brief for Respondents at 18-21 and Brief for Petitioners at 16.
86. In view of this "right to be anonymous," one might question the applicability to small and controversial political organizations of "election reform" laws requiring the reporting of contributions.
87. 283 F. Supp. at 257.

> how high or majestic his or her office, who is within the reach of judicial process, may invoke immunity for his actions for which wrongdoers normally suffer.[88]

His opinion, however, suffers from faults opposite to those of the majority. Whereas the majority was completely stymied by the jurisdictional questions of whether the senators were "within the reach of judicial process," Justice Douglas assumed them away. That assumption, however, was based upon his dissent in *Tenney v. Brandhove*,[89] to which he referred. In that opinion he sketched what, to him, were the outlines of legislative immunity:

> It is speech and debate in the legislative department which our constitutional scheme makes privileged. Included, of course, are the actions of legislative committees that are authorized to conduct hearings or make investigations so as to lay the foundation for legislative action. But we are apparently holding today that the actions of those committees have no limits in the eyes of the law. . . .
>
> No other public official has complete immunity for his actions.[90]

Tenney was a Civil Rights Act case in which a former witness attempted to sue a legislative committee. Although the majority in that case held the committee immune from suit, nevertheless, Douglas' analysis is still instructive. When asking whether activity is within a committee's legitimate legislative sphere, he emphasized the word "legitimate." Clearly, activity that infringes upon first amendment rights is not, in Justice Douglas' view, legitimate.

This may be the very type of analysis that the majority feared would emasculate the speech and debate clause. On the other hand, it is not an approach which is strange to the Court. It was used, for example, in *Powell*,[91] when the Court told Congress how far it might go in passing upon the qualifications of its members. Similar analysis has been applied to administrative decisions and to claims of executive privilege.[92]

For Justice Douglas, the threshold question seemed to be, "Are constitutional rights threatened?" He would recognize no immunity when that question received an affirmative answer.

IV. CONCLUSION

It seems disingenuous for a Court that has rewritten state law

88. 421 U.S. at 518 (dissenting opinion).
89. 341 U.S. 367 (1951).
90. *Id.* at 382-83.
91. 395 U.S. 486 (1969).
92. *See, e.g.*, United States v. Nixon, 418 U.S. 683 (1974).

on murder,[93] abortion,[94] and obscenity;[95] twice reprimanded a sitting president;[96] revised constitutional tests of equal protection[97] and standing to bring first amendment claims;[98] and previously examined the balance between claims of privacy or executive immunity and those of congressional immunity[99] to now refuse to examine the content and effect of a congressional subpoena.

Perhaps it was thought best to avoid the issue. With both the draft and American involvement in a Southeast Asian war at an end, the claims of USSF were largely moot. Furthermore, the House of Representatives had disbanded its counterpart of the Eastland subcommittee and it may be that the Court expected the Senate to follow suit. It is also possible that the Court, already split three ways, would have split further in dealing with the first amendment claims of USSF and such fragmentation was thought inadvisable.[100] It may even be a good omen that the Court had the grace to abstain; the alternative could have been an explicit overruling of *NAACP*.

Jill Beckoff Nagy, '77

93. Mullaney v. Wilbur, 421 U.S. 684 (1975), which revises Maine's statute.
94. Roe v. Wade, 410 U.S. 113 (1973).
95. Miller v. California, 413 U.S. 1 (1973).
96. 418 U.S. 683 (1974); and the Pentagon Papers Case, New York Times Co. v. United States, 403 U.S. 713 (1971).
97. Reed v. Reed, 404 U.S. 71 (1971).
98. Broadrick v. Oklahoma, 413 U.S. 601 (1973).
99. 412 U.S. 306 (1973); 408 U.S. 606 (1972).
100. There were nine opinions filed, in addition to the per curiam decision of the Court, in the Pentagon Papers case. In another controversial case, Furman v. Georgia, 408 U.S. 238 (1972), the death penalty case, there were nine opinions in all.